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No. 30

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

JAMES C. KIRKPATRICK, et al.,
Appellants,

vs.

PAUL W. PREISLER, et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION

PETITION FOR REHEARING

The Appellants, James C. Kirkpatrick and John C. Danforth (who succeeded Norman H. Anderson as Attorney General of Missouri on January 13, 1969 and therefore is automatically substituted for him as a party pursuant to Rule 48.3) move the court as follows:

1. To withdraw the opinion filed in this case on April 7, 1969.

2. To grant a rehearing of the case with opportunity for additional briefing and oral argument.

3. To permit participation *amicus curiae* of any other state which desires to participate.

In the alternative, the Appellants move the Court to modify the opinion of April 7, 1969, and any judgment or mandate entered on the basis of that opinion, and to permit the 1970 congressional elections in the state of Missouri to be held from the districts as established by the Missouri General Assembly in 1967.

FOREWORD

It is coincidental that at the very moment that this case was being argued by Thomas J. Downey, Esq., First Assistant to Attorney General Norman H. Anderson, John C. Danforth was being sworn in as General Anderson's successor after having prevailed against him in the election of November 5, 1968.

The case therefore comes to the present administration of the Attorney General's office at the opinion stage. We now have the responsibility of advising the legislature and other state authorities on the requirements of the opinion, and of presenting the case for the state in further proceedings in this court and the court below.

We perhaps have the advantage of a fresh look at the case. We have no intention of detracting from the prior presentation. We have given careful attention to the briefing and to the oral argument as shown in the transcript. Both appear to us to be outstanding. Yet, viewing the case for the first time, the problems presented by the opinion and by the future proceedings it requires seem to be very serious ones. The emphasis on precise mathematical equality, in our opinion, virtually ousts the legislature from reapportionment matters except in the rare and hardly de-

sirable situation in which a dominant majority could force a prearranged plan through both houses without amendment. This state of affairs, we believe, impedes representative government rather than affording the people better representation.

Since the responsibility is now with this office, and since we must now proceed under the commands of the opinion, we would appreciate the opportunity for a rehearing and for additional briefing and oral argument.

ARGUMENT

I. The opinion of April 7, 1969, goes far beyond existing authority in the requirement that a state "make a good faith effort to achieve precise mathematical equality," and that the state "must justify any variance, no matter how small." The decision not only places in jeopardy the apportionments in most of the states, but also any future attempts that the State of Missouri or other states might make.

Prior to the present decision most of those concerned with reapportionment proceeded on the basis that mathematical exactitude was not the exclusive consideration, *Wesberry* v. *Sanders*, 376 U.S. 1 (1964), and that it was possible to give some attention to existing political boundaries. *Reynolds* v. *Sims*, 377 U.S. 533, 577, 578-9, 586 (1964). *Burns* v. *Richardson*, 384 U.S. 73 (1966), also indicated a flexibility which the present opinion rejects.

The present case initially presented a rather narrow issue. Missouri's 1967 congressional redistricting created districts which were more nearly equal than those existing in any state which had more than one representative in 1964 (See appendix to dissenting opinion of Mr. Justice Harlan in *Wesberry* v. *Sanders*, *supra*), and which were more nearly equal than those existing in the majority of the

states at the present time.[1] The District Court nevertheless rejected the plan, assigning reasons as follows:

(a) Because the legislature, inadvertently and not in bad faith, made use of a map in which some of the county population figures had been erroneously entered;[2]

(b) Because a shift of counties in four instances could have produced districts more nearly approaching equality (App. Jur. Stat., p. 68); and

(c) Because a plan providing for districts more nearly equal in population had been rejected by the legislature.[3]

The District Court was willing to accept the legislature's use of "building blocks" composed of counties in the outstate areas and precincts in the urban areas. It appended three maps to its opinion (App. Jur. Stat., pp. 39-41, 279 F. Supp. l.c. 979-981), presumably to illustrate plans which the majority would approve, and these made use of "building blocks" of counties and precincts. The thrust of the District Court opinion was not that the 1967 plan was a bad one, but that it was not so good as it might have been even by using the building blocks of the type that were used.

Wells v. *Rockefeller*, No. 238 O.T. 1968, argued with this case, involved a similarly narrow issue. The New York legislature had divided the state into eight regional classes, with a very great degree of equality within each class, but with variations between districts in different classes. The

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1. See table, pp. 55-56 of Appellant's Brief on the merits, indicating only ten states having congressional districts more nearly uniform than Missouri's.

2. The District Court specifically stated that it did not question the good faith of the legislators with regard to this map. See Footnotes to App. to Jurisdictional Statement, F.N. 2, p. 3.

3. Judge Collinson specifically disclaimed the rejection of a plan having more nearly uniform districts as a basis for his concurrence. App. to Jur. Stat., p. 97. Judge Matthes, of course, dissented.

variations were greater than in the Missouri case. The basic question was the validity of the emphasis on regional classification.

The Court now enunciates rules and standards which are not found in any prior case, as follows:

> "... the 'as nearly as practicable' standard requires that the state make a good-faith effort to achieve precise mathematical equality...." (Slip opn., p. 4).
>
> "... Unless population variances among congressional districts are shown to have resulted despite such effort, the state must justify each variance, no matter how small." (Ibid.).
>
> "... the command of Article I, Section 2 ... permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown...." Id. p. 5.

The two opinions of April 7, 1969 appear to reject any reliance whatsoever on political subdivisions in establishing the boundaries of congressional districts (Slip opn., p. 7; Slip opn. *Wells* v. *Rockefeller*, p. 5). These holdings go well beyond previous decisions. There is a need for further consideration, as follows:

(i) Many other states have felt, on the basis of *Wesberry* v. *Sanders, supra,* and *Reynolds* v. *Sims, supra,* that they were entitled to give consideration to political boundaries in establishing congressional districts.

(ii) The state of Missouri, in particular, is forced to undergo another redistricting for a single election, without reliable guidance. Even the three plans suggested by the District Court are of doubtful validity, under the language of the opinion of this Court.

The congressional districts in virtually every state are in jeopardy, and there are no reliable guidelines for revision.[4]

II. The opinion has the inevitable and predictable effect of forcing courts to draw district lines themselves in any case in which legislative apportionment is challenged.

It is perhaps not difficult for a person working alone to prepare an apportionment plan with districts that are substantially equal in population. He would need assurance, however, that nobody else would interfere with his efforts or work for changes.

Any proposal for modification would place the entire plan in jeopardy. If the proposal has the slightest effect of increasing the variation between one district and another, it will be charged that the apportioning agency has ". . . rejected a redistricting plan submitted to it which provided for districts with smaller population variances among them. . . ." (Slip Opin., p. 3). It is also said that ". . . The legislature may not accept population variances, large or small, in order to create districts with specific interest orientations. . . ." (Ibid., p. 6). It may even be charged that a legislator who proposes a change in a plan in order to achieve a district which he feels to be more representative of the interests of his constituents is not "acting in good faith."

The legislature must also proceed under the stern injunction that it may never rely on the "de minimis" concept in order to justify any "numerical or percentage population variance." (Ibid., p. 4.) The legislature is told

4. Experienced Washington correspondent James Millstone suggests that all but six states may have to redraw district boundaries on the basis of the present decision. This includes five states which drew new boundaries for the 1968 elections. St. Louis Post Dispatch, April 15, 1969, p. 1-B.

that ". . .. the State must justify each variance, no matter how small." (Ibid.)

State legislatures have not followed the practice of filing findings of fact and conclusions of law in justification of their actions. Sometimes a legislative act will have a preamble to express the reason for legislative concern, but this is normally prepared in comparative leisure at the drafting stage. We cannot expect a contemporaneous justification for each amendment to a reapportionment bill, as it is tendered and considered. The legislature might conceivably prepare an "address to the voters" to accompany an enactment, but this would simply be an apology and would be rejected as summarily as similar arguments in briefs have been. What the opinion really means is that no justification for a population variance could ever withstand challenge. At the very least, a legislature could never rely on the acceptability of such a variance.

The problems introduced by his opinion would not be solved if the redistricting were done by a "bipartisan" commission or other non-legislative body. If the commission had a plural or diverse membership it would face the same problems that the legislature has. One who would suggest any variation in a mathematically precise proposal would risk the invalidation of the entire proposal. The problems of justification would be equally insoluble.

Even the slightest error in computation made during legislative stress might lead to the rejection of the entire plan.

An opponent of a proposal for redistricting might find that his best strategy lay in introducing a deliberate variance. He would not even have to disclose his true

purpose, and could suggest an entirely different motivation. United States District Courts, and state courts, would feel that they had to reject any plan which contains a perceptible and unexplained population differential among districts, in compliance with the opinions of April 7, 1969.

Court challenge to any reapportionment would not only be possible, but inevitable. Some will oppose any reapportionment, for reasons having nothing to do with population. They could go to court, thereby leaving the political situation uncertain until the court could examine the plan and reach a decision. Appeals could lengthen the period of uncertainty. The uncertainty would weigh especially heavily on those who were interested in challenging the incumbent congressmen at the polls.

Under this state of authorities the only safe course for the legislature is to throw up the entire task of apportionment, and insist that the lines be drawn by a court. In seven cases reapportionment has already been done by courts,[5] and more court redistrictings seem inevitable. We show in our next point that court reapportionment is highly undesirable in a state such as Missouri, and that it should be looked to only as a last resort.

A strong and unified party leadership might prepare a bill with districts approaching mathematical equality and might then force it through the legislature without amendment. Such strong-arm tactics by the majority would apparently satisfy the test of the opinion, however disadvantageous the situation might be from the stand-

5. See table on pp. 29-34 of Appellant's Brief on the merits, and also *Koziol* v. *Burkhart*, 241 A.2d 451 (N.J., 1968). The court below indicated that it had in mind the possibility of having to draw congressional district lines, and commented to the procedure it might follow. See App. Jur. Stat., p. 20; 279 F. Supp. 952, 969.

point of representative government. It is patent however that a bill achieved through normal legislative processes, with floor amendment, would probably fall short of the "mathematical equality" standard of the opinion. In almost all instances it would be possible to find means for "improvement" in a plan through transfer of a precinct or a rural township.

The present opinion simply does not allow the normal legislative processes to function, if the legislature is composed of diverse interests.

III. The agency which determines the boundaries of legislative districts inevitably determines the politics of these districts. Such decisions are highly inappropriate for courts.

The politically sophisticated are quick to recognize the political implications of any proposal for reapportionment, or of any suggested changes in such a proposal, from the bare description of districts and boundaries.

Missouri furnishes an excellent illustration of the point. The state is generally considered a "Democratic" state, but there is also a substantial Republican vote. The incumbent governor, a Democrat, is said to have achieved reelection by a landslide in 1968, in receiving 60.5 percent of the total vote. (1,063,495 to 688,300.) The 1968 senatorial contest was decided by 35,000 votes.[6]

The various counties have political characteristics which are widely known and fairly predictable. The figures which follow will illustrate:

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6. Figures are from Roster of State, District and County Officers, published by James C. Kirkpatrick, Secretary of State, Jefferson City, 1969, containing election returns.

REPUBLICAN COUNTIES

	Republican	Democrat
Ozark (Southwest)	1951	728
Mercer (Center, Iowa Line)	1421	821
Gasconade (East Center)	4425	1349

DEMOCRATIC COUNTIES

New Madrid (Southeast "Bootheel")	2735	5644
Monroe (East Center)	1440	3073
Ray (West Center)	2740	3963

The figures just quoted are taken from the extremely close senatorial race in 1968, in order to minimize variations which might be attributed to the particular congressional candidates. Congressional figures, and figures for prior years, are comparable.

A decision to place any one of these counties in a particular district, then, is a decision with strong and evident political overtones. The effect of traditional voting factors in apportionment is illustrated by the Seventh Congressional District of Missouri, in the extreme southwest corner of the state. The Republican candidate for Congress won by 53,000 votes in 1968 and carried every county. The adjoining districts elected Democrats by margins of twelve to twenty-nine thousand. It is apparent that rearrangement of counties might produce a change in representation.

In the legislative proceedings giving rise to the 1967 redistricting, two questions were emphasized at all stages, as follows:

(i) Was there to be a district which could be expected to elect a black congressman?

(ii) Was the St. Louis "suburban" district to be laid out in such a way that it would normally elect a Republican?

Some proposals, including one which was advanced in the House of Representatives and which some claimed to be closer mathematically than the plan finally enacted, would have answered both questions in the negative. Republican members then formed a temporary coalition with black legislators, all of whom were Democrats, to pursue their mutual interests. The coalition achieved success in the bill which was adopted.

Following the entry of the order of the District Court from which this appeal is taken, and before it was known that this Court would allow the 1968 elections to proceed on the basis of the 1967 districting and would hear argument, some Missouri legislators introduced a plan which would have reversed the effect of the 1967 reapportionment with respect to the First (black majority) and Second (Republican majority) districts, and which had wide support. It appeared, therefore, that the coalition would have to be revived to defend the gains which were achieved in 1967.[7]

We suggest that a black legislator is acting with entire propriety in trying to establish a congressional district in which a person of his race can probably secure election, and that minority Republican legislators are acting properly in striving for as many districts as possible in which their party's candidates have a chance. There is complete good faith in each instance. Under the Court's opinion, however, legislators are inhibited in the pursuit of their particular and legitimate goals through the necessity of

7. These efforts had nothing to do with making the districts larger or smaller in population. Four of the ten districts have wider population variances than do the first and second (see Appellants' Brief p. 10).

striving for mathematical equality at all cost. A legislator seeking a district of particular composition has no purpose at all of introducing inequalities in population, but such inequalities may creep in whenever adjustments in lines are proposed. It is possible to have only so many balls in the air at the same time!

The drawing of boundaries is a highly political decision. There is no answer which is "right" or "wrong." The problem is inherent in representative government.

By contrast, a court is a singularly inappropriate vehicle for drawing the boundary lines of districts. Is the Court to decide whether or not there is to be a black congressman? Is the court to say whether or not the Republican voters are to be dispersed or concentrated? Any perceptive judge will sense the political implications in a proposed boundary or shift in boundaries, at a glance. He will have the same realization if he reviews a plan prepared by a master or other assistant. This is so even though he is entirely impartial and apolitical in his approach.

When judges make decisions which involve inherent and unavoidable political factors, there is danger that many members of the public will not accept the holdings as judicial decisions. The prior political affiliations of the participating judges will be aired and political motivation will be charged. Public confidence in the judiciary might well be impaired.

We do not suggest for a minute that a judge should omit any duty because of fear of political reaction. What we do suggest is that the Court, by permitting a degree of leniency in the standards expounded in the opinion of April 7, 1969, can give relief in a situation in which almost all reapportionments will be forced into the courts be-

cause of the sheer impossibility of legislative resolution. The arbitrary decisions in the drawing of district lines are highly inappropriate for the judiciary. The disruption of the normal balance among the branches of the government heavily outweighs the very slight gains which may be expected from a mathematical preciosity. This is especially so since a mathematical equality based on census figures remains valid only for the barest moment.

IV. The opinion produces a result which is undesirable from the standpoint of representative government.

We ask simply that there be some flexibility—some recognition of the thought of Mr. Justice Holmes as expressed in *Bain Peanut Co.* v. *Pinson*, 282 U.S. 499, 501 (1931), as follows:

> "We must remember that the machinery of government would not work if it were not allowed a little play in its joints."

The Chief Justice has quoted this sentiment with apparent approval in *Reynolds* v. *Sims*, 377 U.S. 533, 577 (1964). The present opinion utterly demolishes it.

We understand, of course, that the Court's purpose is to provide better representation for the people. The emphasis on mathematics, however, does not accomplish this purpose. It rather makes for a poorer representation.

The point is illustrated by a map on page 39 of the Appendix to Jurisdictional Statement, which contains a map suggested by the majority of the District Court as indicating an acceptable reapportionment (279 F. Supp. 979). This map indicates a variation of 4500 between the 7th and the 8th Districts, and then indicates that the variation could be reduced to 12 by "transfer of particular townships in Dallas or Laclede Counties."

If this Court's opinion stands, then it would appear that such a transfer of townships would be essential to a valid plan. The ostensible reason would be to give the voters in the transferred townships better representation. Their votes would supposedly be worth less in a district in which more people lived. Such is the logic of a rule of mathematical equality.

This approach is completely divorced from reality. People simply do not think in terms of townships which, in Missouri, are simply polling units. A voter might know which township he was in, from inquiring as to where to vote, but he would have no reason even to ascertain the township boundaries. The detached townships would be political orphans. Many voters would have no idea who represented them in Congress. The inevitable effect of the opinion is to increase the distance between the representatives and their constituents.

V. Even if the Court adheres to the opinion in toto, it should permit the 1970 Congressional elections to be held on the basis of the districts as now established: (a) Because the 1967 apportionment is reasonably fair on its face; (b) because there is no assurance that reapportionment on the basis of the obsolete 1960 census figures would produce a greater uniformity than now exists; (c) because the constant changing of districts inhibits the voters in holding their representatives responsible; and (d) because the gains from a one-time reapportionment would be outweighed by the diversion of the legislature from pressing tasks.

We appreciate the consideration that the Court has shown in allowing the 1968 elections to proceed on the basis of the 1967 reapportionment which it now finds to be invalid. We would not ask for further indulgence, in the absence of a grant of full rehearing, were it not for the circumstance that the 1970 Congressional elections are the last ones to be held on the basis of the 1960 census.

The requirement of a reapportionment for a single election, however, would amount to a penalty against the state of Missouri, its citizens, and its legislature, for an offense which was not wilful or deliberate, simply because the Court has now taken a more rigid view of reapportionment than would appear on the basis of the earlier opinions. No substantial public benefit could be expected from a 1970-only reapportionment, and there might be serious public disadvantage.

The present Missouri districts are not badly apportioned. As we have shown in Point I, there is greater population uniformity than was the case in any state having more than one representative in 1964, and than is presently the case as to the great majority of the states. Citizens suffer dilution of their votes, not because of misapportionment, but because of population changes since 1960. Yet it is so difficult to secure accurate information about these population shifts that any attempted apportionment on the basis of estimated shifts in population would be in danger if the assumptions could not be shown to be precise and accurate. There is a risk in any apportionment which is not tied into the census.

Another disadvantage of constant reapportioning is that legislators are not held to answer to the constituents who chose them. Missouri elected three new congressmen in 1968. If the Court does not grant relief, they must run from different districts in 1970 and from still other districts in 1972. This circumstance interposes an additional barrier between the representative and the represented, and might operate to deprive the state of the benefits of seniority in representation.

We plead finally for consideration of the particular problems of the Missouri legislature. We will not argue that they are more severe than those which face other

legislatures, but they are typical. The state faces a financial crisis, with many varying opinions about sources for additional revenue. The crisis is particularly severe with respect to public education. The two urban areas face particular problems for which they have called on the legislature for help. All of these are in addition to the normal run of legislative problems. It would be unfortunate to add problems of reapportionment at this time, especially since they have proved to be so difficult. Nor would it be a solution to suggest that the legislators forbear use of normal legislative techniques in the consideration of reapportionment, or "rubber stamp" the first proposal that seems to be mathematically equal.

Some favor reapportionment by "bipartisan" commission, and a constitutional amendment has been introduced for this purpose. House Joint Resolution 8, 75th General Assembly of Missouri, is a proposal for constitutional amendment which must be submitted to the voters if the legislature approves it. The amendment would offer a solution to apportionment problems following the 1970 census and, hopefully, there could then be a single apportionment which would last for ten years. But there would be great difficulty in getting the amendment passed, commissioners appointed and a report prepared in time for the 1970 congressional elections. One who wanted to stand for Congress would have difficulty in finding out what district he had to run from.

Any plan submitted by any means, moreover, would have to pass the scrutiny of the District Court with no assurance of approval.

The Court's initial reaction might be that the unfortunate situation just described may not be adjusted by allowing malapportioned districts to remain. This might be a meritorious approach if there were any indication that

reapportionment on the basis of the 1960 census figures would yield more uniform districts. Yet the very opposite is probable. To require a reapportionment for this single election, then, would be to strive for a meaningless goal.

CONCLUSION

The opinion of April 7, 1969, should be withdrawn and a full rehearing granted, with opportunity for additional briefing and argument and for participation of other states.

In the alternative, the Court should permit the 1970 congressional elections to be held on the basis of the present districts, as established by the 1967 legislature.

Respectfully submitted,

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CERTIFICATE

I certify that the within petition for rehearing is presented in good faith and not for delay, and that I believe that it is meritorious.

April 30, 1969.

CHARLES B. BLACKMAR
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